95-1246

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

GLORIA V. SMITH,

Petitioner,

vs.

MARVIN J. RUNYON,
Postmaster General of the United States,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is dismissal required, due to alleged failure to exhaust administrative remedies, of an action alleging racial discrimination in an employment termination, when proper procedures were followed in a pro se plaintiff's pursuit of the discrimination matter?

2. To the extent that the District Court applied collateral estoppel to bar this employment discrimination matter, was the application of that doctrine proper or required?

3. Even if the doctrine of collateral estoppel did apply, should dismissal have been granted based on a collateral estoppel argument which was not raised in the motion to dismiss, but was raised for the first time in a motion for reconsideration?

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GLORIA SMITH, proceeding pro se, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Review is requested so that this Court may emphasize the standards for dismissal of employment discrimination claims allegedly due to procedural defects, and so the Court may declare that dismissal of such claims on highly technical grounds is improper.

OPINIONS BELOW

Affirmance of dismissal of the complaint alleging employment discrimination was issued on August 15, 1995, by the United States Court of Appeals for the Eleventh Circuit. A petition for rehearing was denied by that Court on November 3, 1995.

The Eleventh Circuit had affirmed an order issued April 15, 1994, by the United States District Court for the Southern District of Florida (Gonzalez, J.). The District Court dismissed a complaint by Petitioner Gloria V. Smith against Respondent Marvin Runyon as Postmaster General of the United States. The complaint proceeded chiefly under 42 U.S.C. § 2000e, *et seq.* and 42 U.S.C. § 1983, and related to her termination from her position in the United States Postal Service. The District Court's order was issued on a motion by the Postmaster to reconsider a previous ruling of June 30, 1993, denying a motion to dismiss or alternatively, for summary judgment.

The complaint was filed on July 29, 1992. The granting by the District Court of the motion for reconsideration, and the Court's order thus dismissing the matter, was a final disposition of the matter by that Court. Petitioner took a timely appeal to the Eleventh Circuit and submitted a timely petition for rehearing.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its opinion (per curiam, unreported), in *Gloria V. Smith v. Marvin J. Runyon* (No. 94-4508) on August 15, 1995. The United States District Court for the Southern District of Florida was affirmed. A motion for rehearing (titled as a motion for *en banc* consideration) was filed on or about September 25, 1995. The Court of Appeals treated the motion as a timely filed motion for rehearing, and issued an order on November 3, 1995, denying rehearing.

In accordance with Rule 13.3 of this Court, this Petition is being filed within 90 days of the date of the order denying the petition for rehearing. Jurisdiction of this Court is invoked through 28 U.S.C. §1254(1).

STATUTE INVOLVED

42 U.S.C. § 2000e-16 [pertinent portions]:

> **(a) Discrimination prohibited.** All personnel actions affecting employees or applicants for employment . . . in executive agencies . . . in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive services, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.
>
> * * *
>
> **(c) Civil action by party aggrieved.**

Within 90 days* of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section . . . or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Application of certain provisions. The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

(* prior to a 1991 amendment to this subsection, this time period was 30 days).

STATEMENT OF THE CASE

This matter involves the attempt by Petitioner Gloria V. Smith to obtain redress for her illegal termination from her employment with the United States Postal Service. Ms. Smith enlists the aid of this Court so that she can at last bring her allegations to trial — inasmuch as the District Court improperly dismissed her Complaint.

The overall scenario and the basis for the District Court's dismissal of the complaint concerns previous complaints submitted by Petitioner Ms. Smith, in her consistent attempts to navigate the treacherous procedural waters of civil rights practice. Petitioner maintains that hyper-technical bases for dismissal are not appropriate when reviewing a pro se employment discrimination action in which an aggrieved employee is seeking only to bring certain significant discrimination issues before the court.

A. General Background

As described in Petitioner Gloria Smith's most recently-filed Complaint, she is a black resident of Palm Beach County in Florida. She was employed by the Post Office from February 6, 1972 to July 30, 1988. As alleged, during that employment, particularly from 1982 to 1988, she was the subject of sexual harassment by her supervisor. As alleged, her supervisor bragged to her about how good he was in bed and how much money he had.

When Petitioner was not impressed with these sexual advances, the supervisor's attitude became hostile. He continued to make the work environment hostile and unpleasant to Ms. Smith. For example, as she alleged, she was routinely denied requests for annual leave, although these requests were granted for white employees with less seniority than she.

Also as alleged, on or about March of 1994, Ms. Brown witnessed or became aware of practices in which her supervisor altered the figures on a Postal Service requisition form so that the amount of stamps received and the value of the stamps would not match up — supposedly her supervisor pocketed the difference. She raised questions about these practices, at the same time as she continued to be unresponsive to her supervisor's advances. On several occasions, she went to the West Palm Beach Postmaster with her various concerns, but, as Petitioner stated in her complaint, "to no avail."

On or about June 12, 1985, she was removed from her bid job as a window clerk and was faced with numerous false complaints against her. She continued to be employed with the Postal Service.

In March of 1986 Ms. Smith discovered that the accusations against her, and her responses to them, were not in her union file (American Postal Workers Union). It appeared to her that union involvement in her case was given a low priority, and that this was done at the request of Postal Service management, due to her complaints about her supervisor.

Petitioner, further, was disqualified from other bid jobs, such as a position in finance, although she was the senior bidder. Those jobs went to white employees with less seniority. She was suspended for 34 days. Eventually, on July 30, 1988, she was removed from employment.

B. Complaints and Procedural Results

Following her removal in June of 1985 from her window clerk position, Ms. Brown had initiated an action against the Postal Service (No. 86-8568-CIV-Roettger), after Postal Service EEO activity (and arbitration of her grievances which resulted in

an arbitration ruling of October 31, 1985 denying her grievances). This matter eventually was disposed of by the District Court *sua sponte*, apparently for lack of prosecution.

Subsequently, as she continued to experience difficulty in her Postal Service employment, Petitioner initiated a second action (No. 87-8495-CIV-Hastings (also identified as 87-8495-CIV-King)), also after EEO activity. That litigation began as a suit over various conflicts on her job, including failure of the Postal Service to promote her. Notably, that Complaint did not raise any issues concerning termination, since termination had not occurred.

However, on April 1, 1988, Petitioner received a notice of proposed removal discharging her from the Postal Service effective May 6, 1988. As to this notice of removal, she filed a complaint with the Equal Employment Opportunity Commission (EEOC) and a grievance through her union. This dispute resulted in discussions which supposedly brought about a settlement, allegedly allowing Petitioner to return to work after serving a 22-day suspension. Petitioner, though, as she did below, challenges the Postal Service's contention that any actual settlement took place.

Allegedly, this settlement required her return to work on July 20, 1988. Petitioner was not satisfied with settlement discussions and did not return to work on that date. Accordingly, another notice of proposed removal was issued by the Postal Service, stating that Petitioner would be removed from employment effective July 20, 1988. Petitioner informed the Postal Service on or about July 28, 1988 that she would not return to duty in any case. Petitioner did not treat the settlement discussions as any separate employment action requiring any separate EEO complaint. Instead, the settlement discussions eventually ending in the notice of proposed removal effective

July 20, 1988, were a continuation of Postal Service activity concerning her termination.

Once Petitioner informed the Postal Service that she would not be returning to duty, her termination finally became effective. Inasmuch as her removal from employment thus was effective on or about July 20, 1988 (or July 28, 1988 when she notified the Postal Service that she would not return to work), she filed another claim with the Postal Service EEO office on August 3, 1988 — in any case, well within the prescribed time from either effective termination date for doing so (30 days in the prior version of the statute). (Apparently, Respondent contends that this particular administrative remedy was not pursued.)

At that point, her earlier-filed complaint in District Court was still pending (87-8495-CIV-Hastings). Again, this complaint, when filed, challenged her erroneous removal from her bid job at the Post Office and the denial of certain promotions. The Postal Service EEO canceled the August 3, 1988 complaint she filed following her termination, due to the pendency of the District Court matter. *Petitioner was advised that this cancellation was without prejudice and that her case could be reopened if there was any disposition without prejudice by the District Court of her complaint there.*

Having submitted a claim to EEO, and with the EEO cancellation of that claim, and wishing not to lose any right to contest her termination, Petitioner in November, 1988, amended her pending action (87-8495-CIV-Hastings) to challenge her termination. On June 16, 1989, the District Court dismissed the pending case (87-8495-CIV-Hastings) allegedly for failing to name the proper defendant (that is, the Postmaster instead of the Postal Service) and for failing to exhaust administrative remedies as to the relief requested in the amendment. Petitioner did not appeal that order, although she contends it was improper.

Following the dismissal of that matter, Petitioner pursued another EEO complaint (No. 2-S-0297-88) and obtained an adverse decision. On October 30, 1989, Petitioner thus submitted a third complaint in the District Court (No. 89-8534-CIV-Gonzalez) and in this action again formally challenged her termination, among other matters, requesting relief. This matter, however, eventually was dismissed by the District Court for failing to serve process within 120 days and for failure to exhaust administrative remedies — again, although she had previously just submitted yet another EEO complaint.

Petitioner then requested a reopening of her previous EEO case (No. 3-S-300-88). The EEO office did not reopen the case, contrary to previous assurances. Petitioner appealed this refusal. This appeal was denied on July 27, 1992.

C. Present Complaint and Disposition

Immediately thereafter, on July 29, 1992, Petitioner advanced the present Complaint (92-8456-CIV-Gonzalez). This was her fourth attempt to bring to the Court her issues of employment discrimination, to challenge the harassment and other practices she experienced or witnessed while in the employ of the Postal Service, and to request other relief.

Petitioner's pro se Complaint proceeded chiefly under 42 U.S.C. § 2000e (*i.e.*, 42 U.S.C. § 2000e-16). And she alleged that her removal, the harassment to which she was subjected, and the other activities directed against her violated not only that statute, but also the Fourteenth Amendment and pertinent sections of the applicable collective bargaining agreement.

Petitioner sought in her complaint: damages for intentional infliction of emotional distress, back pay for her suspension, twice the amount of back pay as to damages for her discharge,

attorney's fees, and similar relief. She also sought punitive damages and requested a jury trial.

The complaint named Marvin Runyon, as a proper Defendant. Service of this complaint was effectuated within 120 days. Thus, prior procedural defects which had affected other pro se complaints submitted by Petitioner had been overcome.

On February 24, 1993, the Postmaster submitted a motion to dismiss the Complaint or alternatively, for summary judgment. The Postmaster contended this July, 1992 Complaint was barred by the doctrine of *res judicata* due to the earlier dismissals of her previous complaints on administrative exhaustion grounds. The Postmaster contended the earlier dismissals for failure to exhaust administrative remedies constituted dismissal *on the merits* and precluded any later-filed actions.

Petitioner here points out that this dismissal motion by the Postmaster was directed to this *res judicata* argument. No other similar arguments were presented.

On April 30, 1993, Petitioner responded, stating the earlier dismissals were not dismissals on the merits and that these earlier cases were never ripe for consideration. She reviewed requirements for *res judicata*, pointing out the requirements had not been met. Petitioner further contended that the rules "could not have intended such a harsh penalty as to forever bar an action because of the premature filing of a case."

On June 30, 1993 (by Order signed June 29, 1993), the District Court *denied* the Postmaster's dismissal/summary judgment motion. (App. 9a-10a). The Court noted the *res judicata* requirements of: 1) final judgment on the merits, 2) decision by a court of competent jurisdiction, 3) identity of the parties, and 4) same cause of action. The Court concluded,

"Although the plaintiff has previously initiated three cases involving the same cause of action, there has never been a final judgment on the merits."

This decision by the District Court should have concluded the dismissal efforts as to Petitioner's complaint. However, Respondent then moved on July 14, 1993, for reconsideration, arguing, *for the first time*, application of *collateral estoppel*. Respondent contended in the reconsideration motion that collateral estoppel (as opposed to *res judicata* otherwise known as judicial estoppel) prevents another action from being brought after dismissal of a prior discrimination action for failure to exhaust administrative remedies. Respondent stated that since earlier complaints by Petitioner had been dismissed for failure to exhaust administrative remedies, such a previous judicial determination applied to subsequent complaints — including the present matter. Respondent also contended in his motion that "issue preclusion" or "claim preclusion" was within his earlier motion raising *res judicata*.

Petitioner responded on November 19, 1993. She contended collateral estoppel should not be raised and that in any event, it does not apply. She added, "The only thing this plaintiff seeks is an opportunity to present evidence and have her case heard on the merits in the United States District Court, while the defendant constantly raises specious legal arguments to prevent a trial on the merits. This, to date, has never been done."

There was a reply from the Postmaster and a further response from Petitioner. Petitioner's further response was filed April 6, 1994.

On April 14, 1994, the District Court (Gonzalez, J.), granted the dismissal motion. (App. 5a-8a). The Court took up the issue of collateral estoppel, noting the doctrine "forecloses litigation

of those issues of fact of law that were actually litigated and necessarily decided between the parties, whether on the same or a different claim." The Court noted that the June 16, 1989 dismissal of one of Petitioner's previous complaints (that is, No. 87-8495-CIV-King) partially was based on failure to exhaust administrative remedies as to the relief sought in Petitioner's November 7, 1988 amendment to that complaint.

The District Court then stated [App. 7a, citations omitted]:

> Whereas the claims asserted by the plaintiff in the instant case are essentially identical to those asserted in the amended complaint filed in Case No. 87-8495-King, the Court's prior determination regarding exhaustion of administrative remedies is controlling here. Whereas the plaintiff has presented no evidence that her administrative remedies have been exhausted since June 16, 1989, the Court must dismiss this case for failure to exhaust administrative remedies.

Petitioner appealed from this decision on May 12, 1994 to the United States Court of Appeals for the Eleventh Circuit. She proceeded pro se as to her appeal. On August 15, 1995, the Eleventh Circuit affirmed in an extremely brief, unpublished opinion, (App. 3a-4a), stating:

> The district court's judgment was based upon its holding that Smith had not pursued her administrative remedies in a timely fashion, as required by the applicable regulations, statutory, and case law. We conclude that the district court's holding was correct and its judgment is due to be affirmed.

Petitioner then filed a suggestion for rehearing *en banc*, noting again that the issue of collateral estoppel had not been raised by Respondent in the original motion to dismiss, and was raised only in reconsideration, and stating that the doctrine did not apply. This pleading was treated as a timely filed petition for rehearing (and suggestion for rehearing *en banc*). It was denied by that Court on November 3, 1995. (App. 1a-2a).

REASONS FOR GRANTING WRIT

I.

DISMISSAL OF PETITIONER'S COMPLAINT WAS NOT WARRANTED UNDER COLLATERAL ESTOPPEL. (Questions Presented 1 and 2)

Application of the doctrine of collateral estoppel to require dismissal of this employment discrimination complaint submitted by a pro se litigant was an improper means of disposing of serious discrimination allegations through a technical procedural argument. It is evident that throughout the course of Petitioner's extensive efforts to obtain redress for her allegedly unlawful termination, she diligently has sought, on her own, to pursue proper administrative procedures. Adrift on the perilous procedural seas of employment discrimination actions, Petitioner's action was allowed by the District Court to sink, rather than the Court taking up the matter and permitting the case to proceed on the merits.

Respondent in its reconsideration motion relied chiefly upon, among other authorities, *Solar v. Merits Systems Protection Board*, 600 F. Supp. 535 (S.D. Fla. 1984), an action not brought under § 2000e. The employee in that matter had brought a prior complaint advancing similar allegations as in a subsequent complaint, against the same defendants. The prior

complaint had been dismissed *with prejudice* by the District Court.

The *Solar* court first disposed of the contention that the earlier dismissal was *res judicata* (judicial estoppel) as to the second complaint. The Court noted that the dismissal of the first matter was based on failure to exhaust administrative remedies and concluded, "[t]he doctrine of res judicata does not apply where, as here, there was not a final adjudication on the merits of the first cause of action." The court noted other authority to the effect that:

> A valid and final personal judgment for the defendant which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied, unless a second action is precluded by operation of the substantive law, or the circumstances are such that it would be manifestly unjust to subject the defendant to such action.

Citing, e.g., Segal v. American Telephone and Telegraph Co., 606 F.2d 842 (9th Cir. 1979), at 845.

However, the *Solar* court found that collateral estoppel did apply. The court observed collateral estoppel "forecloses litigation only of those issues of fact or law that were actually litigated and necessarily decided by a valid and final judgment between the parties, whether on the same or a different claim." As to collateral estoppel generally, *see Richardson v. Alabama State Board of Education*, 935 F.2d 1240 (11th Cir. 1991) and *Hart v. Yamaha-Parts Distributors, Inc.*, 787 F.2d 1468 (11th Cir. 1986).

The court stated the prior judicial conclusion that the plaintiff in the earlier complaint had failed to exhaust administrative remedies is controlling as to the complaint before the court "especially since plaintiff has admitted . . . that he has not yet exhausted those remedies." Also, the court added:

> Even if plaintiff was not estopped from raising the issue of exhaustion again, the Court finds that his reasons for failing to exhaust administrative remedies are not sufficient to constitute a defense. Plaintiff has offered nothing but conclusory statements to prove that exhaustion would have been futile; the distance plaintiff must travel to reach the hearing site is not so outrageous as to warrant suspending the exhaustion requirement.

In addition, the *Solar* court said "Not only did plaintiff wait more than two years to file his first complaint, but he filed it in the wrong court. . . ."

The District Court here focused on some of this pertinent language in *Solar* and determined that the conclusion, as to Petitioner's earlier complaint, that administrative remedies had not been exhausted as to the amended version of Petitioner's complaint seeking to challenge her termination, controlled as to the present complaint. That conclusion was not mandated here, given the background in *Solar*.

As this Court indicated in *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), involving a §1983 action and the effect upon a federal court of a state court judgment in the same matter, claim preclusion or collateral estoppel, if other elements are satisfied, precludes issues that

were "actually litigated" in the prior action. The Court extended that concept to preclude claims which could have been raised in a State court matter brought generally under § 1983, as to a later-filed action in Federal court involving the same circumstances.

Here, however, application of the collateral estoppel doctrine is not so specifically required. The exhaustion of administrative remedies matter — assuming that Petitioner actually did fail to exhaust those remedies — was hardly "litigated." The District Court simply concluded, in its June, 1989 dismissal of Petitioner's second complaint, that administrative remedies had not been exhausted. In addition, this was an alternative ground for dismissal.

This was not a situation where Petitioner, as plaintiff, sat on her rights. Nor did she try to avoid the necessity of pursuing administrative remedies. In each situation she filed her claim with the Postal Service EEO. She went back to the EEO after the dismissal on June 16, 1989 of her earlier complaint, to file a claim which was then the subject of a later action in District Court that was dismissed on procedural grounds. Then she sought a determination from the EEO to reopen a prior administrative claim, which was denied despite statements to her otherwise. She appealed that decision, and the appeal was turned down. Even Respondent admitted in its brief before the Eleventh Circuit that Petitioner "had filed administrative challenges to other aspects of her employment throughout her tenure." (Postmaster's Brief at 11). When the appeal from the refusal to reopen her case was concluded, Petitioner proceeded directly to District Court with a *fourth* attempt to be heard. In this scenario, dismissal on these precise procedural grounds therefore was improper.

Also, given the strong public policy purposes behind the Congressional mandate that race and sex discrimination in

Federal employment is not to be tolerated, the exhaustion requirement should not be viewed as an obstacle course. As noted by *Allen v. Butz*, 390 F. Supp. 836 (D.C. Pa. 1975), although the exhaustion requirement is mandatory on its face, it may be appropriate to excuse the requirement or to deem it satisfied in certain instances even though administrative proceedings have not been completed. For example, if a plaintiff could show that attempts to exhaust administrative remedies were frustrated by agency personnel, the court should give some relief from the exhaustion requirement.

In addition, in *Richerson v. Jones*, 572 F.2d 89 (3rd Cir. 1978), a situation similar to this, an employee had filed a formal complaint more than 180 days before filing a district court action, but was persuaded to withdraw the complaint in exchange for promises that the agency would initiate an informal investigation and resolution of the charges. However, the results of the informal investigation did not satisfy the plaintiff. He then resubmitted formal complaints without again filing an administrative claim. In such an instance, the court stated, dismissal for failing to exhaust administrative remedies would be improper, especially since the agency's EEO official did not warn the plaintiff of the effects of withdrawing his complaint.

The requirement that federal employees should exhaust administrative remedies before pursuing a Title VII action in federal court is to be construed liberally. If an EEOC investigation reasonably would be expected to encompass all allegations later raised in the complaint, the district court can consider that the results of the EEOC investigation constituted exhaustion of administrative remedies as to all pertinent allegations of the complaint. Similarly, if a plaintiff employee had exhausted administrative remedies after a first discharge from employment, after which the employee was reinstated, failure to pursue EEOC remedies after a second discharge should

not be fatal to a later-filed action in district court under the statute. This particularly should be the case if the plaintiff does not advance any new charges or add new defendants.

Other courts have expressed a similar interest in offering relief from the technical requirements of proceeding in discrimination actions, especially if dismissal would mean ultimate preclusion of the claim. *See Grubbs v. Butz*, 514 F.2d 1323 (D.C. App. 1975) (District Court's ruling that plaintiff was required to exhaust administrative remedies was incorrect in that further exhaustion should not have been required); *Cozad v. Johnson*, 397 F. Supp. 1215 (D.C. Okl. 1975) (dismissal motion denied where § 2000e-16 does not require exhaustion of administrative remedies but merely that plaintiff wait 180 days before filing civil action after filing EEO claim), and *Brown v. Brown*, 528 F. Supp. 686 (D.C. N.J. 1981) (employee took proper action after agency refused to consider filing of initial charge).

See Chappell v. Emco Machine Works, 601 F.2d 1295 (5th Cir. 1979), in which the court suggested that the requirement of exhaustion of administrative remedies in a Title VII case might be subject to "equitable modification." One of the circumstances indicated by that court as permitting equitable modification is where the employee/plaintiff is misled by the defendant about the nature of the employee's rights under Title VII.

The standard letter from the Administrator of EEO states that an employee whose request for relief is denied may either filed a complaint in federal court within 30 days or may file an administrative appeal to the EEOC within 20 days. This is what Petitioner relied upon when she filed her case in the district court. Yet her previous cases, filed in reliance on this information, were denied on grounds of failure to exhaust administrative remedies. This confusing and misleading information has caused other employees to pursue the wrong

remedy and face dismissal of their cases on technicalities rather than being decided on the merits.

Petitioner urges this Court, therefore, to consider these circumstances and to declare the priorities and policies of § 2000e-16 as balanced against the exhaustion requirement. A review by this Court is essential so that plaintiffs in such matters, especially pro se plaintiffs, will have available to them the relief they are entitled to seek by this statute, without facing extremely technical arguments of exhaustion of remedies and the like, in circumstances such as this.

That is, the exhaustion of remedies requirement is more than a "Congressionally mandated procedure" as Respondent has described it. Rather, it is a process designed to provide some opportunity for administrative review of, and resolution of, an employee's discrimination claim, before the matter is brought to the courts. The exhaustion requirement, therefore, should not be used as a blunt instrument to deny or to preclude discrimination actions.

Further, Petitioner contends that she did exhaust her administrative remedies to the extent available and necessary within the intent of the statute. Before the second complaint was dismissed, Petitioner had filed an EEO action. But it was canceled because of that complaint was pending in the district court. She then amended that complaint to raise her challenge to her termination. One is given to wonder how much administrative exhaustion should be required, and what — or who — is actually being exhausted through a mechanical application of these requirements.

There is no question but that Petitioner, as a lay person, has had some difficulty, while representing herself, dealing with the very complex scheme of rules, laws, regulations, and doctrine.

They all seem to be designed to deny a litigant her day in court.

Dismissal of the complaint here should not have occurred. This Court should reverse the Eleventh Circuit with instructions to reverse the District Court so that the complaint can be reinstated.

II.

COLLATERAL ESTOPPEL DOCTRINE SHOULD NOT HAVE BEEN CONSIDERED BECAUSE IT WAS NOT TIMELY RAISED.

Also, Petitioner maintains that, if Respondent is to insist on specific claims being properly raised only if advanced at specific times, it should not have been permitted to raise its collateral estoppel argument in a motion for reconsideration of the District Court's denial of dismissal sought based on *res judicata* (judicial estoppel). Respondent sought to convince the District Court that since collateral estoppel and *res judicata* were similar doctrines involving issue or claim preclusion, that a collateral estoppel argument was embodied in the earlier dismissal motion advanced on *res judicata* grounds.

Ordinarily, a motion for reconsideration should not raise issues or arguments that were not raised or addressed in the original motion. Yet Respondent was able to bypass that requirement and advance a collateral estoppel argument, obtaining dismissal on that basis although dismissal had been denied on *res judicata* grounds.

This also was improper. The Court erred in granting the motion to dismiss on the grounds of collateral estoppel after denying the motion on *res judicata*. The collateral estoppel argument was a different argument, and consideration by the

Court of it amounted to Respondent getting "two bits of the apple." This violated the substance and spirit of the Federal Rules.

Petitioner raised this concern in her brief to the Eleventh Circuit and in her petition for rehearing. However, the Eleventh Circuit did not undertake any serious review of her contentions, nor did that Court spend any time reviewing the petition for rehearing.

An injustice has been done to Petitioner and to all those in her situation. Petitioner urges this Court to review this matter and to declare the importance of considering employment discrimination claims on their merits.

CONCLUSION

THEREFORE, Petitioner Gloria V. Smith requests of this Court that it GRANT her Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED NOVEMBER 3, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4508

GLORIA V. SMITH,

Plaintiff-Appellant,

versus

MARVIN J. RUNYON, Postmaster General of the United States of America,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion ____, 11th Cir., 19 __, ____ F.2d ____).

Before: BIRCH, BLACK and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing

Appendix A

en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 15, 1995

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4508
Non-Argument Calendar

D.C. Docket No. 92-8456 CIV-JAG

GLORIA V. SMITH,

Plaintiff-Appellant,

versus

MARVIN J. RUNYON, Postmaster General of the United States of America,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(August 15, 1995)

Before BIRCH, BLACK and CARNES, Circuit Judges.

PER CURIAM:

Appendix B

Gloria Smith appeals from the district court's judgment dismissing her Title VII lawsuit against Postmaster General Marvin Runyon in which she claimed she had been discharged from the United States Postal Service because of her race and other factors. The district court's judgment was based upon its holding that Smith had not pursued her administrative remedies in a timely fashion, as required by the applicable regulations, statutory, and case law. We conclude that the district court's holding was correct and its judgment is due to be affirmed.

AFFIRMED.

APPENDIX C — OPINION ON RECONSIDERATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED APRIL 15, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-8456-CIV-GONZALEZ

GLORIA V. SMITH,

Plaintiff,

v.

MARVIN RUNYON, Postmaster General of the United States,

Defendant.

ORDER

THIS CAUSE has come before the Court upon the defendant's Motion for Reconsideration of the Court's Order denying the defendant's Motion to Dismiss or, Alternatively, for Summary Judgment. The motion has been fully briefed and is now ripe for ruling.

The plaintiff brought this action against the Postmaster General of the United States, alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. She has filed three similar actions in the past: Case Nos. 86-8568-CIV-ROETTGER;

87-8495-CIV-KING; and 89-8534-CIV-GONZALEZ. The first, 86-8568-CIV-ROETTGER, was dismissed for lack of prosecution. The second, 87-8495-CIV-KING, was dismissed for failure to exhaust administrative remedies and failure to name the proper party. The third, 89-8534-CIV-GONZALEZ, was dismissed for failure to serve pursuant to Rule 4(j) of the Federal Rules of Civil Procedure.

On February 24, 1993, the defendant filed a motion to dismiss or, alternatively, for summary judgment, pursuant to the doctrine of res judicata. The Court denied this motion, because the records of the plaintiff's earlier cases indicated that none of them had been decided on the merits. The defendant has now filed a motion to reconsider, arguing that this case should be dismissed pursuant to the doctrine of collateral estoppel.

He asserts that one of these earlier cases, Case No. 87-8495-CIV-KING, was dismissed for failure to exhaust administrative remedies. Consequently, he argues that the issue of whether the plaintiff has exhausted her administrative remedies was conclusively decided by the Court in that case, and may not be re-litigated here. Because the Court in 87-8495-CIV-KING determined that the plaintiff had not exhausted her administrative remedies as of the date the case was dismissed, and could not have exhausted since that date (the time period for filing had expired), the defendant argues that this case should be dismissed.

The plaintiff argues that the case should not be dismissed, because she has exhausted her administrative remedies. In support of this argument, she has offered evidence of an administrative complaint filed by her on August 1, 1988. This

administrative complaint was dismissed on March 6, 1989, due to the fact that she had a case (87-8495-CIV-KING) pending at that time in the U.S. District Court. The plaintiff has not addressed the issue of collateral estoppel.

Collateral estoppel forecloses litigation of those issues of fact or law that were actually litigated and necessarily decided between the parties, whether on the same or a different claim. *Solar v. Merit Systems Protection Board*, 600 F.Supp. 535, 536 (S.D. Fla. 1984); *Richardson v. Alabama State Board of Education*, 935 F.2d 1240, 1245 (11th Cir. 1991). In Case No. 87-8495-CIV-KING, the Court determined that, as of June 16, 1989, the plaintiff had not exhausted her administrative remedies with regard to the claims asserted in her amended complaint, filed November 7, 1988. Consequently, her complaint was dismissed.

Whereas the claims asserted by the plaintiff in the instant case are essentially identical to those asserted in the amended complaint filed in Case No. 87-8495-CIV-KING, the Court's prior determination regarding exhaustion of administrative remedies is controlling here. *See Solar v. Merit Systems Protection Board*, 600 F.Supp. 535, 536 (S.D. Fla. 1984). Whereas the plaintiff has, presented no evidence that her administrative remedies have been exhausted since June 16, 1989, the Court must dismiss this case for failure to exhaust administrative remedies.

Accordingly, having reviewed the motion and the record, and being otherwise duly advised, it is hereby:

ORDERED and **ADJUDGED** that the defendant's Motion for Reconsideration is **GRANTED**. Upon

reconsideration, the defendant's Motion to Dismiss or alternatively, Motion for Summary Judgment is **GRANTED**. The above-styled action is hereby **DISMISSED**. All pending motions are hereby **DENIED** as moot.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 14th day of April, 1994.

s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: Counsel

APPENDIX D — ORDER ON SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JUNE 30, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-8456-CIV-GONZALEZ

GLORIA V. SMITH,

Plaintiff,

v.

MARVIN RUNYON, POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE,

Defendant.

ORDER

THIS CAUSE has come before the Court upon the defendant's Motion to Dismiss or, Alternatively, for Summary Judgment.

The defendant argues that the plaintiff's complaint should be dismissed pursuant to the doctrine of res judicata, because the Court has previously dismissed identical actions. In order for the doctrine of res judicata to bar a subsequent suit, four elements must be present: (1) there must be a final judgment on the merits, (2) the decision must be rendered by a court of competent jurisdiction, (3) the parties, or those in privity with

them, must be identical in both suits; and (4) the same cause of action must be involved in both cases, *I.A. Durbin, Inc. v. Jefferson National Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986). Although the plaintiff has previously initiated three cases involving the same cause of action, there has never been a final judgment on the merits.

Accordingly, having reviewed the motion and the record, and being otherwise duly advised, it is hereby:

ORDERED and **ADJUDGED** that the defendant's Motion to Dismiss or, Alternatively, for Summary Judgment, is **DENIED**.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 29th day of June, 1993.

s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: counsel

(2)

Supreme Court, U.S.
FILED
APR 5 1996
CLERK

No. 95-1246

In the Supreme Court of the United States

OCTOBER TERM, 1995

GLORIA V. SMITH, PETITIONER

v.

MARVIN J. RUNYON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether petitioner is barred, under the doctrine of collateral estoppel, from relitigating the issue of whether she had exhausted her administrative remedies.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1246

GLORIA V. SMITH, PETITIONER

v.

MARVIN J. RUNYON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-4a) is unpublished, but the judgment is noted at 65 F.3d 182 (Table). The opinion of the district court (Pet. App. 5a-8a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1995. A petition for rehearing was denied on November 3, 1995. The petition for a writ of certiorari was filed on February 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was employed by the United States Postal Service from February 6, 1972, until July 30, 1988, when her dismissal became effective. Pet. 4. The instant case is the fourth in a series of lawsuits that petitioner filed in the United States District Court for the Southern District of Florida, alleging racial discrimination, reprisal, and sexual harassment by the Postal Service. Pet. App. 5a-6a. Petitioner's first action was dismissed for lack of prosecution. *Id.* at 6a. Petitioner's second action, in which she alleged, *inter alia*, that her firing was the result of racial and gender discrimination in violation of Title VII of the Civil Rights Act of 1964, was dismissed for failure to exhaust administrative remedies and failure to name the proper party as defendant. Pet. App. 6a. Petitioner filed a third action, which was dismissed for failure to serve the opposing party as required by Rule 4(j) of the Federal Rules of Civil Procedure. *Ibid.*

Petitioner filed the instant action, which involves essentially the same allegations as her second suit, in July, 1992. Pet. App. 7a. The district court dismissed this action for failure to exhaust administrative remedies. The district court held that petitioner was collaterally estopped from relitigating the court's ruling on exhaustion in petitioner's second suit and that petitioner had not exhausted her administrative remedies since that earlier ruling. *Ibid.* The court of appeals affirmed. *Id.* at 3a-4a.

1. a. On October 6, 1986, while still employed by the Postal Service, petitioner brought an action against her employer in the United States District Court for the Southern District of Florida. Peti-

tioner alleged, *inter alia*, that the Postal Service had breached the collective bargaining agreement, defrauded her of compensation, and improperly removed her from her position as a window clerk.[1] *Smith* v. *United States Post Office*, No. 86-8568 (S.D. Fla.) (*Smith I*); Defendant's Summary Judgment Memorandum Exh. A.[2] That action was eventually dismissed for lack of prosecution in March, 1988. Pet. App. 6a.

b. On July 8, 1987, while *Smith I* was pending, petitioner filed another complaint against the Postal Service, alleging racial discrimination and reprisal. *Smith* v. *United States Postal Service*, No. 87-8495

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[1] Petitioner had previously filed a grievance with her union concerning her removal from the window clerk position. On October 31, 1986, after an arbitration hearing, the Arbitrator denied petitioner's grievance. The Arbitrator found that

> [t]he Grievant's performance, as outlined, is almost unbelievably bad. The Union suggests that she might have been helped by more remedial training, but I find this highly unlikely. The Grievant's problem was not her lack of knowledge and skills, but rather was her careless and irresponsible attitude toward her job and toward the customers of the Postal Service. Her contention that Mr. Bullard was picking on her is 180 degrees off the mark; if anything, he went to considerable trouble to rescue her from the consequences of her own carelessness, and even when it became impossible to tolerate her unsatisfactory performance any longer he allowed her to remain a postal employee instead of resorting to disciplinary removal action.

Defendant's Summary Judgment Memorandum at 2, *Smith* v. *United States Postal Service*, No. 87-8495 (S.D. Fla.) (*Smith II*). See also Pet. 5-6.

[2] Unless otherwise identified, the court papers cited in this brief were filed in the instant action.

(S.D. Fla.) (*Smith II*); Defendant's Summary Judgment Memorandum Exh. B. The focus of that complaint was petitioner's five-day suspension without pay in September, 1986.

c. On April 5, 1988, the Postal Service notified petitioner that she was to be removed from her position, effective May 6, 1988, because of her repeated failure to maintain a satisfactory attendance record. Pet. 6; Response to Defendant's Motion for Reconsideration Exhs. 1, 2. Petitioner filed a grievance with her union challenging that notice. The dispute was resolved by a settlement that allowed petitioner to return to work on May 31, 1988, after serving a 22-day suspension. *Ibid.*

Petitioner, however, did not return to work by May 31 as agreed. Accordingly, on June 8, 1988, the Postal Service advised petitioner that she would be removed from her position if she did not report to work immediately. Petitioner did not report to work. On June 20, 1988, the Postal Service issued a new notice of removal advising petitioner that she would be dismissed effective July 30, 1988. On July 28, 1988, petitioner informed the Postal Service of her decision not to return to duty. Pet. 6; Response to Defendant's Motion for Reconsideration Exh. 1. Petitioner has never filed an administrative complaint specifically challenging the June 20, 1988, notice of removal. Defendant's Summary Judgment Memorandum, *Smith II*, at 4.

d. At about the time of her termination, petitioner filed two formal Equal Employment Opportunity (EEO) complaints with the Postal Service, neither of which referenced the June 20, 1988, notice of termination. On July 28, 1988, petitioner filed a formal EEO complaint (Case No. 3-S-0297-88), alleging racial dis-

crimination and reprisal in her disqualification from consideration for an accounting clerk position in January, 1988.[3] On August 3, 1988, petitioner filed another EEO complaint (Case No. 3-S-0300-88) challenging the April 5, 1988, notice of termination (the subject of her union grievance, which had already been settled).[4] Each of those complaints concerned employment actions that occurred prior to the June 20, 1988, notice of termination.

e. On November 7, 1988, petitioner amended her complaint in *Smith II*. As amended, the complaint alleged race discrimination, reprisal, and sexual harassment, and challenged, *inter alia*, her July 30, 1988, termination from employment. Petitioner claimed that the Postal Service's actions constituted willful violations of Title VII, as well as of 42 U.S.C.

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[3] On September 25, 1989, the Postal Service issued a final agency decision in Case No. 3-S-0297-88. The Postal Service agreed with an administrative law judge's recommendation against a finding of discrimination.

[4] On March 6, 1989, the Postal Service dismissed Case No. 3-S-0300-88 because it believed that petitioner was simultaneously contesting the same matter in federal district court in *Smith II*. Response to Defendant's Motion for Reconsideration Exh. 3. The Postal Service advised petitioner that, if the district court denied jurisdiction of her lawsuit, she could seek reopening of her EEO administrative claim challenging the April 5, 1988, notice of termination. *Ibid.*

After *Smith II* and *Smith III* were dismissed, petitioner requested reopening of that administrative claim. The Postal Service denied her request on March 26, 1992. Response to Defendant's Motion for Reconsideration Exh. 6. Petitioner timely appealed that denial to the Equal Employment Opportunity Commission. On July 27, 1992, the Commission affirmed the Postal Service's decision not to reopen the claim. Pet. 8.

1981 and 1983. Defendant's Summary Judgment Memorandum Exh. B.

The Postal Service moved to dismiss or, in the alternative, for summary judgment, on the ground that petitioner had failed to exhaust her administrative remedies by not administratively challenging the July 30, 1988, termination. The Postal Service also argued that petitioner's complaint should be dismissed for failure to name the proper defendant. On June 16, 1989, the district court granted the defendant's motion to dismiss *Smith II* on both grounds. Pet. App. 6a. Petitioner did not appeal that decision. Pet. 7.

f. Petitioner filed a third lawsuit against the Postal Service on October 30, 1989. *Smith* v. *Frank*, No. 89-8534 (S.D. Fla.) (*Smith III*); Defendant's Summary Judgment Memorandum Exh. C. The district court dismissed that suit on January 31, 1991, for failure to effect service on respondent within the time period set forth in Rule 4(j) of the Federal Rules of Civil Procedure. Pet. App. 6a; Pet. 8.

2. Petitioner brought the instant action against respondent on July 29, 1992, alleging racial discrimination, reprisal, and sexual harassment in violation of Title VII, the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. 1983. *Smith* v. *Runyon*, No. 92-8456 (S.D. Fla.) (*Smith IV*). The focus of her complaint was the allegation that "Defendant's discriminatory practices * * * resulted in Plaintiff being fired from her employment * * * based on her race (Black) and reprisal, in violation of Plaintiff's rights under Title VII." Complaint at 4 (¶ 18). Petitioner also alleged that her removal violated her constitutional rights and the terms of the collective bargaining agreement. *Id.* at 3 (¶ 17),

4 (¶ 18). Petitioner sought relief including "twice the amount of back pay from her date of being fired" and back pay for an unspecified "suspension of thirty-four (34) days." *Id.* at 4 (¶ 21).

3. The district court dismissed the case for failure to exhaust administrative remedies. Pet. App. 5a-8a.[5] The district court noted that it had previously dismissed petitioner's action in *Smith II* on the ground that petitioner had failed to exhaust her administrative remedies. It also noted that "[c]ollateral estoppel forecloses litigation of those issues of fact or law that were actually litigated and necessarily decided between the parties." *Id.* at 7a. Since petitioner's claims in the present case are "essentially identical" to those asserted in *Smith II*, the district court found that "the Court's prior determination regarding exhaustion of administrative remedies is controlling here." *Ibid.* The district court went on to conclude that,"[w]hereas the plaintiff has[] presented no evidence that her administrative remedies have been exhausted since June 16, 1989 [the date that *Smith II* was decided], the Court must dismiss this case for failure to exhaust administrative remedies." *Ibid.*

4. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 3a-4a. The court of appeals held that the district court correctly determined that petitioner had not exhausted her administrative remedies in a timely fashion, as required by the applicable statutes, regulations, and case law. *Id.* at 4a.

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[5] The district court granted respondent's motion to dismiss after reconsideration of the court's initial denial of that motion. Pet. App. 9a-10a.

ARGUMENT

It is well settled that a federal employee must exhaust her administrative remedies before bringing a Title VII claim against her employer in federal district court. See *Brown* v. *General Services Admin.*, 425 U.S. 820, 832-833 (1976).[6] In this case, the district court held (1) that it was bound by its earlier determination in *Smith II* that petitioner had not exhausted her administrative remedies as of June 16, 1989; and (2) that petitioner "presented no evidence that her administrative remedies ha[d] been exhausted since June 16, 1989." Pet. App. 7a.

Under the doctrine of collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit * * * involving a party to the prior litigation." *United States* v. *Mendoza*, 464 U.S. 154, 158 (1984). Thus, collateral estoppel will bar a party from relitigating a particular issue of fact or law if three requirements are met: (1) the issue is identical to one that was raised in a previous suit involving that party; (2) the issue was actually litigated and decided in the previous suit; and (3) the issue was necessary to the judgment in the previous suit. See *Richardson* v. *Alabama State Bd. of Educ.*, 935 F.2d 1240, 1245 (11th Cir. 1991).

All three requirements are met in this case. Petitioner's complaints in this case and *Smith II*

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[6] Under the regulations in effect at the time, petitioner was required to initiate contact with the Postal Service's EEO Counselor within 30 days of the matter alleged to be discriminatory. 29 C.F.R. 1613.214(a)(1)(i). Once the "counseling" process finished, petitioner could file a formal, written complaint with the agency. See 29 C.F.R. 1613.214(a)(1)(ii).

contain essentially the same allegations of racial discrimination, reprisal, and sexual harassment. Petitioner's complaint in this case alleged that her July, 1998, termination was the product of racial discrimination and reprisal; that she was sexually harassed by her supervisor from 1982 to 1988; and that she was improperly removed from various bid positions within the Postal Service during her employment. Each of those allegations was contained in her complaint in *Smith II* (as amended, November 7, 1988). The two cases therefore raised the same issues of administrative exhaustion. That issue was actually litigated and decided in *Smith II*. Respondent there moved for dismissal or, in the alternative, for summary judgment, on the ground that petitioner had not exhausted her administrative remedies. The district court explicitly ruled on that issue in respondent's favor.[7]

The district court's holding in *Smith II* that petitioner failed to exhaust was also necessary to the judgment in that case. The failure to exhaust was one of two grounds on which the district court granted respondent's motion to dismiss (the other being peti-

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[7] Petitioner contends that the exhaustion issue was "hardly 'litigated' " in *Smith II* because the district court "simply concluded, in its June, 1989 dismissal of Petitioner's second complaint, that administrative remedies had not been exhausted." Pet. 15. It is unclear what petitioner is arguing here. She may be referring to the fact that, as the court noted in *Smith II*, she "failed to timely respond to the defendant's motion to dismiss" in that case. *Smith II*, Order at 1. Petitioner's failure to timely respond, however, does not mean that the issue was not litigated. Petitioner does not deny that she was provided a full and fair opportunity to litigate the exhaustion issue. See *Montana* v. *United States*, 440 U.S. 147, 153 (1979).

tioner's failure to name the proper defendant). The fact that the district court gave alternative bases for its decision does not mean that neither ground was "necessary" to its decision. A judgment based on alternative grounds generally precludes relitigation of either ground. See *Schellong* v. *INS*, 805 F.2d 655, 658 (7th Cir. 1986), cert. denied, 481 U.S. 1004 (1987); *Gelb* v. *Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986), cert. denied, 480 U.S. 948 (1987); *Deweese* v. *Town of Palm Beach*, 688 F.2d 731, 733-734 (11th Cir. 1982); *In re Westgate-California Corp.*, 642 F.2d 1174, 1176-1177 (9th Cir. 1981).

Petitioner contends that the district court's resolution of the exhaustion issue in *Smith II* was incorrect. Pet. 15. She argues that the administrative claims that she filed prior to that decision—which challenged employment actions that occurred before July, 1988—should have been construed broadly to encompass all of her discrimination claims, including her claim in the instant case that she was fired in July, 1988, because of her race and gender. Pet. 16-17. Petitioner also argues that "[t]he requirement that federal employees should exhaust administrative remedies before pursuing a Title VII action in federal court is to be construed liberally." Pet. 16. Collateral estoppel bars reconsideration of those arguments.[8]

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[8] As an independent ground for granting a writ of certiorari, petitioner contends that it was error for the district court to consider the collateral estoppel argument because it was raised for the first time in respondent's motion for reconsideration in the district court. The premise of that argument is incorrect. Respondent explicitly raised the affirmative defense of collateral estoppel in his Answer to petitioner's Complaint.

Finally, the district court in this case found that petitioner did not produce any evidence that she had exhausted her administrative remedies after *Smith II* was decided on June 16, 1989. Petitioner does not contend that she initiated any new administrative proceedings after that date. Nor did any of the administrative claims that petitioner initiated prior to that date challenge her June 20, 1988, notice of termination, which is the primary focus of her complaint in the instant case.[9]

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[9] Two EEO discrimination cases that petitioner filed with the Postal Service were finally resolved by the agency after the district court decided *Smith II*. See notes 3-4, *supra*. As previously noted, those cases concerned: (1) petitioner's claim that she was not considered for an accounting clerk position in January, 1988 (Case No. 3-S-0297-88); and (2) petitioner's challenge to her April, 5, 1988, notice of termination, which was subsequently withdrawn pursuant to a settlement (Case No. 3-S-0300-88). The resolution of those administrative cases, however, did not necessarily serve to exhaust petitioner's administrative remedies for purposes of the instant case.

As a general rule, a federal employee may not seek judicial review of "new acts of discrimination" that have not been the subject of administrative claims. See *Wu* v. *Thomas*, 863 F.2d 1543, 1547 (11th Cir. 1989). Whether allegations of discrimination in a judicial complaint are "new" depends upon whether they are " 'reasonably related' to charges in the administrative filing and 'no material differences' between them exist." *Ibid.* See also *Ong* v. *Cleland*, 642 F.2d 316, 318 (9th Cir. 1981) (whether plaintiff has exhausted his or her administrative remedies depends on an analysis of the "fit" between the administrative charges brought and investigated and the allegations of the subsequent judicial complaint); *id.* at 320 (finding that administrative claim of discrimination in promotion did not encompass employee's later judicial complaint of constructive discharge). Whether the instant lawsuit is sufficiently "related," for purposes of exhaustion, to petitioner's administrative claims regarding employment actions that oc-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARLEIGH D. DOVER
MARY K. DOYLE
Attorneys

APRIL 1996

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curred prior to her termination requires a fact-based inquiry that does not warrant this Court's review.